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IN THE
Supreme Court of the United States

OCTOBER TERM, 1943.

No. 629

EDWARD M. BRYAN, ET AL.,

Petitioners,

vs.

A. A. CREAVES,

Respondent.

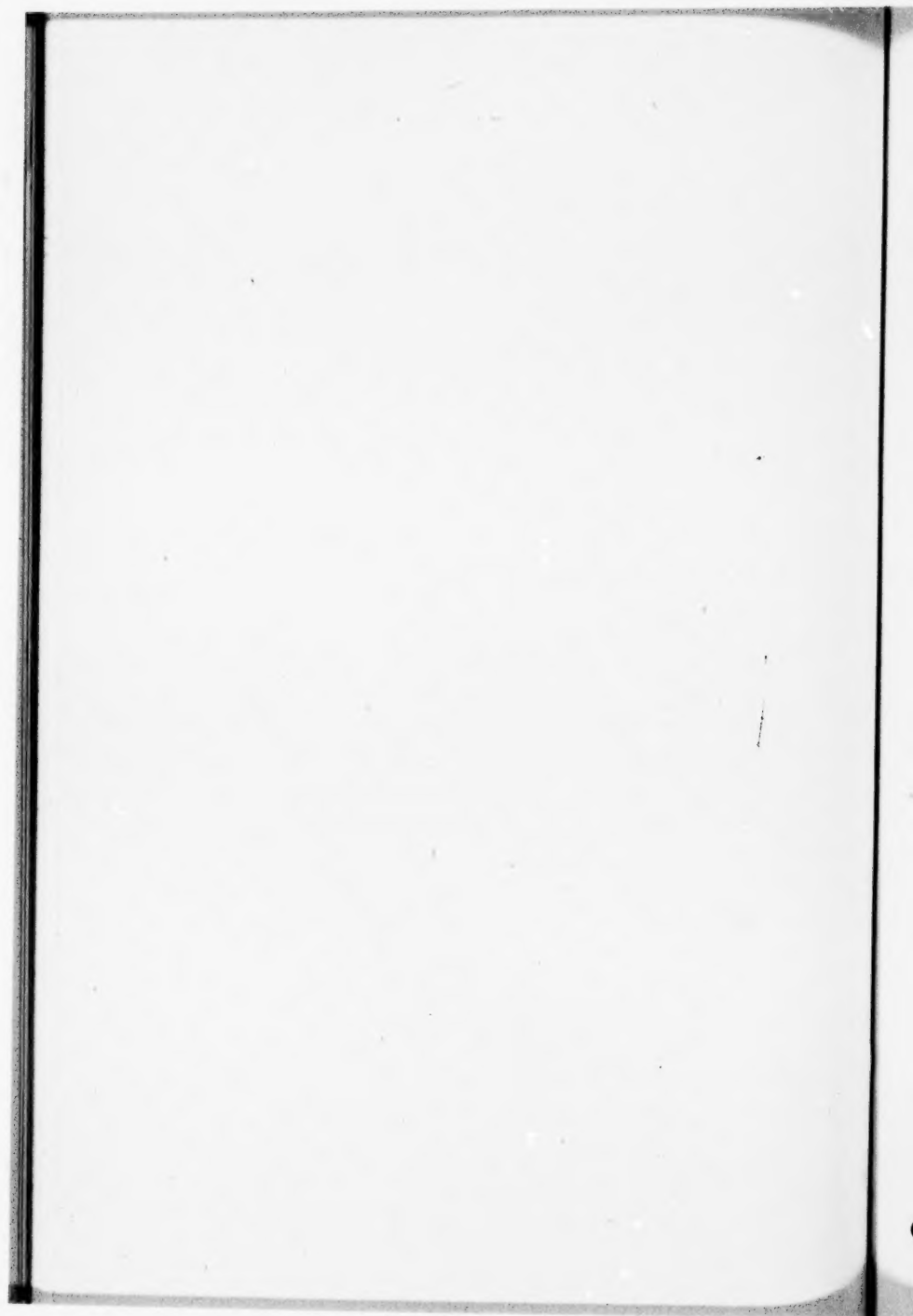
**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.**

FRANCIS HEISLER,
LEON M. DESPRES,
STANLEY F. EVANS,
J. J. GORDON,

77 W. Washington St.,
Chicago, 2 Illinois,

Counsel for Petitioners.

FRANCIS HEISLER,
Of Counsel.



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Edward M. Bryan, T. H. Olson, H. L. Fisher, R. F. Lundeen, John DeLeys, W. E. Jones, Herman L. Seelye and H. W. Overbey, petitioners, pray that a writ of certiorari be issued to review a judgment of the United States Circuit Court of Appeals for the Seventh Circuit, which judgment affirmed the order of the United States District Court for the Northern District of Illinois, Eastern Division, which order,—without an opinion,—dismissed this cause.

Opinions Below.

The opinion of the Circuit Court of Appeals is set out in the record (Tr. 246-249), and is reported in 138 F. (2d) 377. The order of the District Court, without findings of fact, without conclusions of law, and without an opinion, is set out in the record (204 and 205).

Jurisdiction.

The opinion of the Circuit Court of Appeals was filed on the 28th day of October, 1943 (Tr. 245).

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, March 25, 1940, October 21, 1940 and May 26, 1941.

Questions Presented.

1. Did the Circuit Court of Appeals, by erroneously interpreting the laws of the State of Illinois, establish a new State law contrary to the well-established rule that such judicial legislation is improper?

2. Did the Circuit Court of Appeals, in disregarding the law of the State of Indiana,—the State where the contract was entered into,—thereby reverse the rule of law that the interpretation of a contract is governed by the *lex loci contractus*? (b) If there be a conflict of law between the State *loci contractus* and the State where a defendant,—not a party to the contract,—is sued, will the Circuit Court of Appeals, by disregarding the *lex loci contractus*, dissolve, or rather, create a conflict of law?

3. When an equity suit in the Federal Court of Indiana is terminated against certain defendants (trustees), pursuant to a covenant not to sue, reserving the right to proceed in Illinois against a third party (co-trustee), is the Circuit Court of Appeals authorized (a) in holding under the Illinois law that the covenant not to sue is a release of the Illinois defendant as a joint tort-feasor, (b) disregarding the Indiana law as to a qualified release which does not release anyone but the person so released, (c) ruling,—contrary to the expressed wording of the covenant not to sue that the parties intend to reserve their right of action

against the third party,—that such reservation of right notwithstanding, the third party is released?

4. Is the Circuit Court of Appeals authorized (a) to disregard the fact that the defendant here was sued on an express trust, (b) that suit was brought in equity for accounting for an unliquidated claim, and (c) that rules of law, even if properly interpreted, are not to apply to an equity suit against a trustee.

STATEMENT.

Nature of Proceedings.

The proceedings here involve an order of the United States District Court for the Northern District of Illinois, Eastern Division (hereinafter referred to as the Illinois District Court) dismissing Petitioners' amended complaint filed against the defendant (Tr. 204, 205), and the subsequent judgment of the Circuit Court of Appeals for the Seventh Circuit affirming the order of dismissal (Tr. 250).

The Facts.

Petitioners filed their original complaint against the present defendant and against Damon and Edith Smith, the Oxford Institute and the National Funding Corporation in the Illinois District Court, charging the individual defendants with fraud, deceit and acts of omission as trustees acting on behalf of the Petitioners, and prayed that the Court order the defendants to account for the moneys found to be due to Petitioners (Tr. 2-48 and 49). Damon and Edith Smith claimed residence in Indiana and thus lack of jurisdiction in the Illinois District Court, and obtained their dismissal from the suit (Tr. 38, 40). Petitioners then filed their suit against Damon and Edith Smith in the District Court of the United States, Southern District of Indiana, Indianapolis Division (hereinafter referred to as the Indiana District Court) (Tr. 166-185), where, after extended hearings, the court ordered the two defendants to account as recommended by the Master (Tr. 70 to 144). The accounting was proceeded with to determine the profits obtained and expenses incurred by defend-

ants in operating certain farms found to have been purchased with moneys deposited on behalf of the Petitioners in a certain trust account. During the accounting a settlement was offered by defendants along the lines of a memorandum agreement dated April 16, 1942 (Tr. 185-192), which stated, among others, that:

"The parties are desirous of composing and compromising their differences without further litigation. * * * A stipulation shall be entered into before the Special Master disposing of said action according to the terms of this memorandum * * * (The defendants) shall convey to the first parties (Petitioners) * * * their interest in real estate * * * as to suits now pending in the United States District Court in Chicago between certain of the first parties (Petitioners) as plaintiffs and A. A. Creaves, Oxford Institute and National Funding Corporation, as defendants, it is agreed that no judgment shall be taken against either the Oxford Institute or the National Funding Corporation * * * with the right to continue such actions to judgments against A. A. Creaves shall remain unimpaired and this agreement shall constitute no release of any liability of said A. A. Creaves. * * * It is further agreed that the claims asserted by the first parties (Petitioners) against the third parties (defendants) exceed the value of the land which is to be conveyed by the third parties. * * *" (Tr. 185-191.)

Subsequently, the lands referred to in the memorandum agreement were conveyed by the Indiana defendants to Petitioners, who simultaneously gave them their "Indenture of Agreement and Covenant Not to Sue" on April 29, 1942 (Tr. 195-198). The covenant, referred to the memorandum agreement of April 16, 1942, as a "Stipulation and Agreement" which

"* * * contemplated the exchange of mutual covenants not to sue the parties thereto and the exchange of such assurances that the controversy between the parties had been fully terminated", (Tr. 195).

After referring to the dismissal of the suit in the Indiana District Court and the dismissal of the Indiana defendants from the suits in the Illinois District Courts, the covenant further states that the Petitioners,

“* * * separately and severally covenant and agree with the parties of the second part (Indiana defendants) separately and severally that they will not individually, separately or jointly institute or prosecute or cause to be instituted or prosecuted any proceeding.
* * * The foregoing covenants not to sue and the acceptance of such mutual covenants not to sue by the parties hereto shall not be and is not to be taken to be a discharge or satisfaction of the whole or any part of the liability of the parties hereto, and shall not in any wise affect any claim which any party hereto has or may have against any person or corporation growing out of the operation of the Oxford Institute contingent bonus fund; and particularly any claim which any or all of the undersigned my have in respect thereof as against Albert A. Creaves, * * *” (Tr. 195, 197).

The original suit filed in the Illinois District Court was on behalf of two of the Petitioners. An additional suit was filed by the remaining Petitioners against the same defendants (Tr. 49, 50). Both of these Illinois cases were from time to time continued while proceedings were had before the Indiana District Court on behalf of all of the Petitioners. After the execution of the covenant not to sue, A. A. Creaves remained the sole defendant in the two suits filed in the Illinois District Court, which suits were consolidated (Tr. 53) and then the amended complaint (Tr. 56-70), was filed on June 23, 1942, which amended complaint was dismissed by the order of the Illinois District Court, from which order an appeal was taken to the Circuit Court of Appeals for the Seventh Circuit.

The amended complaint alleged that the Petitioners were employees of Oxford Institute of which the officers and the majority stockholders were Damon and Edith Smith (de-

fendants in the Indianapolis suit), and of which defendant Creaves was a stockholder and secretary-treasurer in charge of the office (Tr. 22-29; 32-36 and 58); that Petitioners were induced to agree to invest part of their earnings in the "Trustees' Oxford Institute Fund", the trustees of which,—among them the Indiana defendants and defendant Creaves,—were to invest the money in Government bonds and other good securities (Tr. 29-31 and 59). Said fund was managed exclusively by the Indiana defendants and by defendant Creaves, who refused to give any information to the Petitioners concerning the status of said fund during its existence from 1929 to 1939 (Tr. 59-60).

The amended complaint further alleged that defendant Creaves, in conspiracy with the Indiana defendants, purchased defaulted stocks at less than face value and sold such depreciated stocks to the trust at full face value; that he invested moneys belonging to the trust in real estate and in oil stocks and leases; that he withdraw some \$20,000 cash from the trust and turned it over to the defendants in the Indiana suit for their own purposes (Tr. 60-61); that prior to the termination date of the trust agreement defendant Creaves by artifice, fraud, threats and intimidation caused the Petitioners to release their interest in said trust and to exchange such interest for shares in the National Funding Corporation, which corporation was organized and officered by the Indiana defendants and by defendant Creaves; that the latter falsely kept the books of said corporation; withheld checks with intent to defraud Petitioners; withheld funds belonging to them for his own benefit and for the benefit of the Indiana defendants; wrongfully commingled funds belonging to the trust with those belonging to Oxford, and wrongfully used for his own purposes the money so commingled; failed to keep records and kept false and forged records; converted moneys,—belonging to the Petitioners and to be deposited

in said trust,—for his own use and for the use of the defendants in the Indiana suit (Tr. 60-61).

The above allegations were substantially the same as the allegations in the original suits in Illinois and in the Indiana law suit. There were, however, additional allegations in the amended complaint which were based on the testimony of the defendants in the Indiana suit. So it was alleged against the defendant Creaves that he converted Government bonds deposited with the trust and belonging to the Petitioners in the amount of \$31,880.08 and transferred the proceeds to the personal use of himself and the defendants in the Indiana suit; that he transferred \$15,358.00 belonging to the Petitioners and deposited said sum to the personal account of the Indiana defendants who used the same to purchase a certain farm and that other moneys,—belonging to the Petitioners and on deposit in the trust,—were transferred by defendant Creaves to the Indiana defendants to purchase additional lands in Illinois (Tr. 62-94, 95-99); that after the purchase of said lands the defendants to the Indiana suit managed and controlled them for their own use and for the use of defendant Creaves; that out of the Illinois land, or rather from the oil leases thereon, the defendants in the Indiana suit received \$84,000.00, of which 20%, or \$16,800.00 was wrongfully turned over to defendant Creaves; and that further sums were received from the oil leases by the Indiana defendants amounting to \$41,192.02, of which the defendant Creaves received wrongfully a 20% cut amounting to \$8,022.58. The further sum of approximately \$50,000.00 was received by the Indiana defendants, from which defendant Creaves again received a 20% cut, or the sum of \$9,241.94, which moneys rightfully belonged to the Petitioners (Tr. 65 and 66). Petitioners prayed for an accounting by defendant Creaves and for other relief (Tr. 62-70).

Defendant Creaves filed on September 1, 1942, his an-

swer and claimed that the cause of action is the same as that sued upon by the Petitioners in the Indiana suit, and that the defendant's liability, if any, is included in or joined with the liability of the defendants in the Indiana suit; that Petitioners have executed an agreement with the defendants in the Indiana suit releasing them from all liability to the Petitioners, and pleaded such release as a bar to the action on the amended complaint (Tr. 147). Defendant Creaves further claimed as his defense that Petitioners were estopped from making a claim against him for the converted trust funds because Petitioners elected in the Indiana suit to claim the land into which the converted trust funds were invested (Tr. 148). Defendant Creaves,—as a third defense,—denied some of the allegations of the amended complaint (Tr. 150) but admitted the sale of the Government bonds belonging to the Petitioners; admitted the deposit of the proceeds with the Oxford Institute, though denied the conversion by him (Tr. 150). He also admitted the transfer of \$15,350.00 in trust money from the trust account to the account of the Indiana defendants and the use of that money for the purpose of purchasing certain lands; admitted that the land so purchased belongs to the Petitioners; admitted the purchase of additional lands, but denied conversion by himself. He admitted that the Illinois land and oil properties,—purchased with Petitioners' money,—were managed and controlled by the defendants in the Indiana suit; admitted that he received the sum of \$16,800.00 from the defendants in the Indiana suit, which moneys came from the lease money obtained by them on the Illinois land, but he denied that he received additional sums from the Indiana defendants and denied that the money belongs to Petitioners (Tr. 151).

Petitioners filed their reply (Tr. 150-157), in which they set forth that while the cause of action in the amended complaint arises from the same transaction complained of

in the original Illinois suits and in the Indiana suit, but that there are other acts and charges against defendant Creaves not previously charged against the defendants in the other suits; that the agreement of April 16, 1942, did not release defendant Creaves because said agreement was merely a preliminary memorandum, executory in character, and that it expressly provided that the right of action against defendant Creaves should remain unimpaired. The reply further stated that said agreement released no one and particularly did not release defendant Creaves, and that it provided that the claim asserted by the Petitioners against the defendants in the Indiana suit exceeds the value of the land which was conveyed to Petitioners, and represents a part satisfaction only (Tr. 154); that the amended complaint had attached to it the report of the Special Master in the Indiana suit which report was stricken by the Court on Defendant Creaves' Motion on the ground that, "this defendant was not a party to said proceedings" (Tr. 155); that defendant Creaves acted as trustee for Petitioners and, having been guilty of fraud, he cannot profit from his illegal and fraudulent acts done as a fiduciary (Tr. 155). Petitioners filed their Motion to strike defendant Creaves' defenses, and on September 18, 1942, this motion was overruled by the Court (Tr. 158. The Court then ordered that the parties submit briefs in support of their respective positions concerning the defense of release claimed by defendant Creaves (Tr. 159).

About a month later, on October 16, 1942, defendant filed a stipulation of the parties that defendant Creaves have leave to file *instanter nunc pro tunc* as of the date of his answer, *i. e.*, September 1, 1942, his Motion for Summary Judgment; that the hearing held on September 18th be deemed to have been held on said motion; that in connection with such hearing there be deemed to have been

submitted to the Court the matters of record and that the briefs to be filed on October 16th be deemed to be briefs in support and in opposition to said Motion for Summary Judgment. An order was entered accordingly (Tr. 160, 161). Defendant Creaves' Motion for Summary Judgment is substantially a repetition of his defense as to the release,—in the Indiana suit,—as a bar to this action, and, in the alternative, that if the agreement of April 16, 1942, be held not to be a release, it is still a bar to this action as a complete composition and settlement of the claim sued upon (Tr. 162). The stipulation of October 16, 1942, sets forth that the transfers required by the agreement of April 16, 1942, in the Indiana suit were made, except that Petitioners claim non-compliance in certain matters (Tr. 165); that on April 29, 1942, when the Indiana defendant executed their deeds and made the transfer to the Petitioners, they in turn executed a certain "Indenture of Agreement and Covenant Not to Sue," stated to be in effectuation of the agreement dated April 16, 1942.

On the 30th day of October, 1942, defendant Creaves filed his motion that he will

"* * * move the Court to strike the 'Affidavit in opposition to defendants' Motion for Summary Judgment' filed herein (by Petitioners) on October 22; 1942" (Tr. 201, 202).

on the ground that it does not comply with Rule 56. An order was entered on said date that,

"An affidavit in opposition to defendants' motion for Summary Judgment be and it is hereby stricken from the record herein." (Tr. 202, 203.)

On the same day Petitioners filed their Motion for leave to be given to one of them to file his "Affidavit in Opposition to the defendants' Motion for Summary Judgment" and that said affidavit be filed *nunc pro tunc* as of the 22nd day of October, 1942, which motion was denied by the Court

on the same day (Tr. 202, 203), on which date the Court entered a further order that defendants' Motion for Summary Judgment be sustained and that the cause be dismissed at Petitioners' cost, from which order of the trial court Petitioners appealed (Tr. 204, 205). On the 7th day of November, 1942, Petitioners filed their motion that the orders of October 30, 1942 be vacated and that Petitioners be given leave to have their attorney withdraw his signature from the stipulation filed on October 16, 1942, providing that defendant Creaves has leave to file *instante nunc pro tunc* as of September 1, 1942, his Motion for Summary Judgment and further that defendant Creaves' Motion for Summary Judgment filed on October 16, 1942, be stricken from the record.

As ground for said motion, Petitioners set forth that the stipulation of October 16, 1942, providing for the filing of a *nunc pro tunc* motion by defendant Creaves was signed by Petitioners' counsel upon the agreement that an "Affidavit in Opposition" to said Motion for Summary Judgment may be filed on behalf of Petitioners within ten days from October 16, 1942, and that no objection thereto would be raised by defendant Creaves; that in violation of that agreement attorney for defendant Creaves,—after he obtained the signature of Petitioners' attorney to said stipulation,—moved the court that Petitioners' "Affidavit in Opposition" to defendant's Motion for Summary Judgment be stricken. This motion filed on behalf of the Petitioners was denied on November 13th (Tr. 218-222, 226).

Notice of Appeal was filed by Petitioners (Tr. 228-229) together with their statements of points (Tr. 229-233), their appeal bond (Tr. 234-235) and designation of record on appeal (Tr. 235-238).

The Circuit Court of Appeals sustained the orders of the trial court in all respects (Tr. 250).

Specification of Errors To Be Urged.

The Circuit Court of Appeals, in affirming the judgment of the District Court, erred in that it:

1. misinterpreted the laws of the State of Illinois by ruling that defendant here is released. Such ruling is in disregard of the clearly expressed intent of the parties to two agreements in a Indiana law suit, providing that none of the parties thereto should be released from liability and particularly that as to the defendant here, the right of action shall be maintained. By such misinterpretation the court in effect established a new rule of law for the State of Illinois contrary to the decisions of the Supreme Court of the United States.

2. (a) utterly disregarded the fact that the agreements in question were entered into in Indiana and that in interpreting the agreements, the law of the State of Indiana should control, which law provides for no release of any other parties but those who are intended to be and were released by the wording of the agreement: (b) created a conflict of state laws. The agreements to be interpreted were entered into between the parties to a suit in Indiana, in the State of Indiana, and the performance by those parties was had partly in Indiana and partly in Illinois. Even if there were a conflict between the State laws of Indiana and Illinois, such a conflict is not dissolved by disregarding the State laws of Indiana;

3. holding that terminating an equity suit in the Indiana District Court pursuant to a preliminary memorandum of agreement followed by a document entitled "Covenant Not to Sue", given to defendants in that suit who, as trustees, were joint-tort feasons with the defendant in the Illinois suit, thereby, (a) the defendant, in the Illinois District Court, was released because of such agreements; and (b) that the Indiana law,—which even in case of a qualified

release provides that no one but the person released is affected by the document,—is not controlling; (c) considered certain portions of the Indiana agreements, disregarded other definitive statements therein, and contrary to the intention of the parties to said agreements, ruled the defendant in this case as released.

4. (a) The defendant here was sued as a trustee, but, nevertheless, the law of trustees was left out of consideration by the court and (b) the court below disregarded the fact that the suit here was filed in equity for an accounting of unliquidated claims, and that the rules of equity and the laws of trusteeship are to be considered as controlling; (c) the court failed to consider that whenever equity jurisdiction is invoked, the strict rules of law do not apply, but rather, justice and equity ought to govern.

Reasons for Granting the Writ.

In affirming the judgment of the District Court, which dismissed the suit against defendant here, the Circuit Court of Appeals, by misinterpreting the law of the State of Illinois concerning releases and covenants not to sue, in fact established a new law for the State of Illinois, which new law is contrary to the decisions of the State Courts. By arbitrarily disregarding the expressed intention of the parties to the documents to be interpreted, and giving a tortuous interpretation to, at best, doubtful wordings in the documents, the Court below reached the decision contrary to law and equity, as it will be shown in the argument here to follow.

The question presented involved the determination whether or not two documents, one entitled "Memorandum Agreement" and the other "Covenant Not to Sue", executed prior to the termination of a certain equity suit in Indiana, were or were not releases given to the party

defendants, and whether or not the same released a co-trustee,—not party to the Indiana suit,—who was sued in the Illinois District Court. Even in case the finding of the Court below were to be correct as to the Illinois law, in disregarding the law of Indiana, which law is clearly contrary to the court's finding, a conflict was in fact created with the decisions of other Circuit Court of Appeals.

The question of trusteeship; the question of equity jurisdiction, were clearly disregarded by the court below in applying a strict interpretation of rules of law and applying them erroneously to an equity case involving a trustee. By disregarding such factors, and affirming the order of dismissal, Petitioners were deprived of the due process of law.

I.

The Memorandum Agreement and the Covenant Not to Sue Given by Petitioners to Certain Defendants in the Indiana Suit Do Not Operate to Discharge the Defendant Here Because Those Documents Did Not Surrender Any Right But Simply Expressed an Agreement Not to Sue the Persons Involved, in Accordance With the Intention of the Parties, Which Also Reserved the Right of Action Against the Defendant Here.

The memorandum agreement of April 16, 1942 was put in writing while proceedings to account were going on in accordance with the order of the District Court of Indiana directed against the defendants, who were co-trustees with Creaves, defendant in Illinois (Tr. 185-192, 164). The accounting so begun was to determine the rents and profits that accrued, and expenses incurred by the Indiana defendants during the many years of operation and control of some 2,700 acres of farm land, including some 800 acres of oil land, upon the Master having found that trust funds

belonging to the Petitioners were invested in said lands (Tr. 164). During the course of the Indiana accounting hearings, Petitioners, as plaintiffs, and the defendants commenced negotiations for settlement of the litigation and on April 16, 1943, a tentative memorandum as a basis for a contemplated settlement was dictated by the Master to the court reporter. The memorandum was thereafter transcribed by the reporter, amended by the parties, and, as amended, executed on or before April 29, 1942 but dated as of April 16, 1942 (Tr. 164). The agreement is the first one of the documents in question on the basis of which the defendant here claims a release. The document is entitled "Agreement" and appears on pages 185-192 of the transcript. Pertinent parts of the agreement were quoted heretofore in this Petition under the heading "The Facts".

From April 16th to April 29, 1942, the parties to the Indiana suit carried on further negotiations and on the latter date the conveyances and transfers required by the agreement were made, except, as the Petitioners claim, certain portions of the agreement were not complied with on the part of the defendants (Tr. 165). On April 29, 1942, the defendants to the Indiana suit delivered their deeds and assignments to Petitioners, who in turn executed a document entitled "Indenture of Agreement and Covenant Not to Sue", which covenant (Tr. 195 to 198) was stated to be "in effectuation of the agreement dated April 16, 1942" (Tr. 165, 166). The pertinent portions of this covenant not to sue are cited by us under the heading "The Facts".

We submit that the decision of the Court below is unwarranted because, in accordance with the Illinois law, the documents in question did not release anyone and particularly did not release the defendant herein. Even if, wrongfully, one were to disregard the fact that the defendant here is sued in equity, even if, wrongfully, one were to disregard the further fact that the defendant is sued by a *cestui*

que trust for wrongdoing as trustee, the Illinois law will not conclude, as the court below did, that a covenant not to sue is a release of a joint tortfeasor. The Illinois law, as it has been repeatedly decided, will distinguish between a release and a covenant not to sue, because the settled rule is that while a release of one joint tortfeasor releases all, a covenant not to sue given to the joint tortfeasor releases no one. The leading Illinois case on the subject is *City of Chicago v. Babcock*, 143 Ill. 358, wherein a joint tortfeasor claimed that a written covenant not to sue amounted to an accord and satisfaction and claimed that such covenant was not only a bar to an action against the other tortfeasor, but also, by operation of law, was a release. This contention was rejected by the Supreme Court in stating:

“Where there are a number of tortfeasors, the party injured may, at his election, sue one, or several, or all; and where suit is against one or some of the wrongdoers, but not against all, the person or persons sued have no right to complain. And so, also, where there is suit against several tortfeasors, the dismissal of the suit against one does not bar the action against the others. (*Knapp v. Roche*, 94 N. Y. 329; *Sloan v. Herrick*, 49 Vt. 327; *Bloss v. Plymale*, 8 W. Va. 393.) A release to one of several joint tortfeasors is a release to all, and an accord and satisfaction with one of them is a bar to an action against the others. Here there is no claim of a technical release under seal. The pending suit against LeCardi was dismissed, and a written agreement was signed that no action should be begun against LeCardi by appellee. This, on its face, was simply an agreement or covenant not to sue. The legal effect of such a covenant is not the same as that of a release. A covenant not to sue a sole tortfeasor is, to avoid circuity of action, considered in law a discharge, and a bar to an action against such tortfeasor. But the rule is otherwise where there are two or more tortfeasors, and the covenant is with one of them not to sue him. In such case the covenant does

not operate as a release of either the covenantee or the other tort feors, but the former must resort to his suit for breach of the covenant, and the latter can not invoke the covenant as a bar to the action against them."

In the case of *West Chicago St. R. R. Co. v. Piper*, 165 Ill. 325, the plaintiff received payment from one of the joint tort-feors and executed a written document which could not be produced on the trial, and the other joint tort-feor claimed the acceptance of such payment and the execution of a certain document as a release. The Supreme Court of Illinois disagreed with this contention, and, to the contrary, it concluded that a transaction whereby one joint tort-feor paid the plaintiff money and the plaintiff thereupon dismissed the suit as to that defendant, had no tendency to prove a release or accord and satisfaction. Therefore the court ruled that acceptance of payment from one joint tort-feor raises no presumption that it is in satisfaction of plaintiff's demand.

In the case of *C. & A. Ry. Co. v. Averill*, 224 Ill. 516, the plaintiff settled with one of the joint tort-feors for a consideration and dismissed her suit against it. The other joint tort-feor filed special pleas alleging that the settlement was in bar of the action because, as it was contended, the instrument given to the first tort-feor was a release. The court, having examined the instrument, stated on page 522:

"It provides that it is expressly agreed and understood that the contract shall not be held or construed to be a release of any damages or right of action arising to appellee by reason of any matters at that date existing. The legal effect of a covenant not to sue is not the same as that of a release. * * * the covenant does not operate as a release of either the covenantee or the other tort feor, but the former must resort to his suit for breach of the covenant and the latter cannot invoke the covenant as a bar to an action

against him. (*City of Chicago v. Babcock*, 143 Ill. 358; *West Chicago Street Railroad Co. v. Piper*, 165 Ill. 325.) The covenant in question was not to sue, and therefore came clearly within the rule announced in the two cases above cited and did not operate as a release to appellant."

In line with this decision we point to the agreement of April 16th, executed by the Petitioners in the Indiana lawsuit, which in effect was nothing but an executory agreement laying down certain propositions which they intend to carry out because they "are desirous of composing and compromising their differences without further litigation". To do so, the parties contemplated that, "A stipulation shall be entered into before the Special Master disposing of said action according to the terms of this memorandum", and it contemplated certain payments by the defendants to the Petitioners, for which the plaintiffs "shall protect, by appropriate instrument" the defendants from further liability. This agreement, while contemplating payment to the plaintiffs, stipulates that even though such payments be made, "the claims asserted by the first parties (Petitioners) against the third parties, exceed the value of the land which is to be conveyed". The intention of the parties to that agreement is clearly expressed when it is stated that, "The parties agree not to sue each other * * * on any claims accruing up to this date involved in this cause or referred to herein", but it expressly provides that "the right to continue such actions to judgment *versus* A. A. Creaves shall remain unimpaired and this agreement shall constitute no release of any liability of said A. A. Creaves to any parties hereto." That said agreement was an executory one is definitely expressed in the last paragraph thereof, which states:

"* * * that the foregoing provisions are general in character and subject to execution of appropriate instruments, orders and decrees pertaining thereto as may be required" (Tr. 185-192).

We submit that the court below erred when it found that this agreement was a release of the defendant here. In fact, the parties expressly stated their intention to release no one, but rather to proceed with the execution of appropriate instruments for the purpose "not to sue each other", and that "proper instruments shall be executed to safeguard * * * accordingly" (Tr. 187, 188). The agreement was nothing more than a memorandum laying down certain stipulations on the basis of which the suit may be terminated, but only upon the execution of the appropriate instrument. The appropriate instruments were the transfers given by the defendants to the Indiana suit to Petitioners, and the execution of the "Indenture of Agreement and Covenant Not to Sue" by Petitioners (Tr. 195-198). Looking upon this covenant not to sue in line with the decision of the Supreme Court of Illinois in the *C. & A. Ry. Co. v. Averill* case, *supra*, we find that, just as in the Averill case, the parties to this covenant "expressly agreed and understood that the contract shall not be held or construed to be a release of any damages or right of action * * *." The covenant, in question here, states (Tr. 195), in referring to the agreement executed on April 16th, 1942, that a " * * * certain stipulation and agreement contemplated the exchange of mutual covenants not to sue the parties thereto * * *". The body of the document (Tr. 196-7) gives the wording of a usual covenant not to sue, and then expressly states that:

"The foregoing covenants not to sue and the acceptance of such mutual covenants not to sue by the parties hereto shall not be and is not to be taken to be a discharge or satisfaction of the whole or any part of the liability of the parties hereto * * *" (Tr. 197).

The phrasing of this proviso clearly shows that the court below erred when it considered the covenant to be a release of the parties or of the subject matter of the litigation. It

is clear that the court erred when it further found that the self-same document released the defendant here when it provided that:

"* * * and shall not in any wise affect any claim which any party hereto has or may have against any person or corporation growing out of the operation of the Oxford Institute Contingent Bonus Fund; and particularly any claim which any or all of the undersigned may have in respect thereof as against Albert A. Creaves" (Tr. 197),

and, further, that:

"It is further understood and agreed that the mutual covenants and agreements * * * nothing contained herein shall affect in any manner the liability of said Albert A. Creaves as trustee of said Oxford Institute Bonus Fund" (Tr. 197).

The court below, on the basis of *Aiken v. Insull*, 122 F. (2d) 746 (CCA 7), concluded that the document here involved is a release, quoting the Insull case to the effect that:

"We are satisfied that in substance (actual intent) as well as in form (language employed), the instrument constituted a release" (Tr. 248).

It appears that the court in construing a document looks to two indices, namely, the intent of the parties and the language used. We submit that both of these indices, if applied to this case, rule out a release because the intent of the parties is clearly expressed that they are contemplating, not a release, but rather the termination of the litigation and an agreement not to sue each other. This intent is expressed in unambiguous language, and, even under the decision of the Insull case, the court below erred when it affirmed the judgment of the trial court. The court below, however, erred further because its decision is contrary to the law of the State of Illinois. It is contrary to the decision in the case of *Vandalia R. R. Co. v. Nordhaus*, 161 Ill. App. 110. It is contrary to the decision in the case

of *Wallner v. Chicago Consolidated Trac. Co.*, 245 Ill. 148, in which case the Court decided that one of the main characteristics of the release is the extinguishing of the claim, which was not the intention of the parties in the instant case, who clearly stated that the covenant not to sue:

“* * * shall not be and is not to be taken to be a discharge or satisfaction of all or any part of the liability of the parties hereto, and shall not in any wise affect any claim which any party hereto has or may have * * *” (Tr. 197).

Contrary to the decision of the court below, the *Wallner* case, *supra*, held that an accord and satisfaction extinguishes the cause of action. A covenant not to sue does not extinguish the cause, but is a mere agreement not to enforce it. As it was otherwise stated, “the right remains but the covenantor agrees not to exercise his right”, as in this case Petitioners agreed not to exercise their rights against the defendants to the Indiana suit. This distinction was clearly summarized in the *Pacific States Lumber Company v. Bargar*, 10 F. (2d) 335, wherein, on page 337, it is stated:

“Releases of, and covenants not to sue, a wrongdoer have from early times been considered distinct. A covenant not to sue one of several joint obligors or joint tort feorsors did not at common law operate to discharge others from liability, since it was said not to have the effect, technically, of extinguishing any part of the cause of action. * * *

“Indicia of a covenant not to sue may be said to be: No intention on the part of the injured person to give a discharge of the cause of action, or any part thereof, but merely to treat in respect of not suing thereon (and this seems to be the prime differentiating attribute); full compensation for his injuries not received, but only partial satisfaction; and a reservation of the right to sue the other wrongdoer.”

The Circuit Court of Appeals erroneously disregarded this distinction when it affirmed the judgment of the trial

court and disregarded the distinction made by the Illinois law between a release and a covenant not to sue. There is a distinction as to their purpose, their nature, and their consequence; there is a difference in the legal effect produced by such documents. The court below disregarded the Illinois law which clearly states that a release is a relinquishment of a claim, while a covenant not to sue is merely an agreement not to enforce a claim. It erred when it found that the Indiana documents released the defendant here, even though those documents expressly excluded the relinquishment of the claim and simply provided for an agreement not to enforce a claim that is existing and the maintenance of which was expressly stipulated. A release, in accordance with the Illinois law, surrenders a right, which the Petitioners here did not do by the Indiana documents. They did waive their remedy, and thereby in accordance with the Illinois law the document remains a covenant not to sue.

In misinterpreting the law of Illinois as the court below did, it rendered a decision contrary to the established law of that State and contrary to the rule in *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, wherein the Supreme Court of the United States stated on page 78:

“* * * There is no federal, general law * * * Congress has no power to declare substantive rules of common law applicable in a state, whether they be local in their nature or ‘general’, be they commercial law or a part of the law of torts. And no clause in the constitution purports to confer such a power upon the federal courts”.

Because the erroneous decision of the Circuit Court of Appeals attempts to establish a new state law, we submit that the case should be brought here for review.

II.

Decision of the Court Here Is in Conflict With the Decisions of Other Circuit Courts of Appeals.

In applying the law of the State of Illinois,—*lex fori*,—to the interpretation of a contract that was made in the State of Indiana, the court here rendered a decision in conflict with other Circuit Courts of Appeals. As it appears from the record throughout, the two documents, namely, the agreement of April 16, 1942 and the covenants not to sue of April 29, 1942, both were entered into in the State of Indiana, terminating an equity suit maintained in a District Court in that state. Petitioners having dismissed their suit in Indiana, that state became at least in part the state of the performance. It is true that the instant suit was filed in the State of Illinois and thereby that state became similarly the forum, but the laws of the State of Illinois did not thereby become the *lex loci contractus*. The opinions of the courts are quite unanimous that:

“Matters of validity which go to the very basis of the making of a contract involve primarily the law of the place where the contract was made. * * * The trend, however, if any, among the authorities and treatises, seems to be toward accepting the law of the place of making as governing the validity and constructions of a contract.” 11 Am. Jurisprudence, p. 397. (Citing many cases.)

The same authority states further that:

“The validity or invalidity so determined will generally be recognized wherever it is sought to be enforced even though the law of the forum would have determined otherwise if applied.”

19 Am. Jurisprudence, p. 401 (citing many cases).

To the same effect spoke Beale in his *Conflicts of Law*, on pp. 1171 and 1174.

There is no doubt in cases where the place of the making of the contract is also the place where it is to be performed, since then the *lex loci contractus* and the *lex loci solutionis* are the same. There may be, however, some doubt when the making and performing of the contract are in different places. Under those circumstances the Supreme Court of the United States found the rules to be that:

“(1) matters bearing on execution, interpretation, and validity are determined by the law of the place where the contract is made;

“(2) matters connected with the performance are regulated by the law of the place where the contract, by its terms, is to be performed; and

“(3) matters relating to procedure depend upon the law of the forum.”

Scudder v. Union National Bank, 91 U. S. 406, 23 L. Ed. 245.

This rule was observed by the various Circuit Courts of Appeals. In the instant case, however, the court below disregarded this rule and failed to look to the law of Indiana, where the contracts were made, but rather applied the law of Illinois, and as we respectfully submit, erroneously. Thus, by looking to the laws of the forum in preference to the *lex loci contractus*, the court brought its decision, as to the rule of law to be applied to the interpretation of contracts, into conflict with decisions with other Circuit Courts of Appeals.

Assuming, though not admitting, that the laws of the State of Illinois are as interpreted by the court below, even then we maintain that in accordance with the well-established rule hereinabove set forth, and applying the laws of the State of Indiana, the decision would have to be contrary to that handed down in this case. The Indiana courts consider on this subject the case of *Parry Mfg. Co. v. Crull*, 56 Ind. App. 77, 101 N. E. 756, as the leading case. In that

case the plaintiff, an employee of a railroad company, was injured. He executed a document stating that to avoid litigation between himself and the railroad company and to avoid the expenses of such litigation, and to

“* * * forever set at rest the differences so existing between them, but in such way that such settlement shall not impair or affect the claim of said Crull against any person or corporation other than said railway company for negligently causing or helping to cause the said injury * * * the said Abner D. Crull, hereby covenants and agrees for himself * * * that neither he, they, nor any of them will ever sue or bring any action against said Indianapolis Union Railway Company, on account of injuries and damage to him occasioned by or growing out of the accident above described.”

The court held the document to be a covenant not to sue and said:

“The argument advanced and the cases cited in its support would have much force if it were true that the release of one joint tort-feasor would have the effect to release all, but such is not the rule. A distinction should be observed between releasing a claim and releasing one of the parties liable.”

The court after reaffirming the well-known rule of law that a release of a claim releases of all continues:

“* * * but he may release one of the parties so liable without releasing the others. The injured party may enforce his demand against all the joint wrongdoers except one and thus relieve that one of paying any part of his demand.”

Further:

“The authorities quoted state the rule in reference to a joint and several obligation arising out of contracts, but we can see no reason why the same rule should not apply to a like obligation arising out of a tort. In fact, there seems to be less objection in applying the rule in the latter class of cases than in the

former, for the reason that no contribution is allowed as between joint tort feasons."

On the basis of the above opinion and on the authorities cited, the Court, with reference to the document executed, held that:

"The contract between appellee and the railroad company cannot be construed as a release to that company of the claim which he was asserting against it. On the contrary, it is clearly manifest from the terms of the agreement that appellee did not intend to release his claim, but that he intended to retain it."

The court goes into the problem with reference to partial satisfaction, which we similarly claim in our case, and sets forth that:

"However, where it is expressly agreed as in this case, that the amount paid is only a partial satisfaction, the other jointly or severally liable as tort-feasons are not relieved as to the residue of the damage, but the payment made will be regarded as a satisfaction *pro tanto*, as to the others. There is a decided conflict of authority upon this question, but we have reached the conclusion that the better reason as well as the weight of authority sustains the conclusion reached in this opinion." (Citing cases.)

Petitioners, in executing the two documents here in question, were not unmindful of the Illinois law and framed the documents so that they might be brought under the decision in the case of *C. & A. R. R. Co. v. Averill*, *supra*. Being led by the unanimous rule of law that in interpreting a contract the *lex loci contractus* govern, the documents followed closely the document mentioned in the case of *Parry Mfg. Co. v. Crull*, *supra*, under which decision neither the "Agreement" of April 16, 1942 nor the other, called "Covenant not to Sue" of April 29, 1942, can be considered a release of anyone, and particularly not a release of the defendant here.

For the reasons that the Circuit Court of Appeals here, in conflict with other Circuit Courts of Appeals, failed to look to the *lex loci contractus*, but looked exclusively to the *lex fori*, and because the decision of the court below is contrary to the laws of the State of Indiana, we respectfully submit that the case ought to be brought here for review.

III.

The Terminating of an Equity Suit in the Federal Court of Indiana Pursuant to Agreements Which in That State Are Not Considered Releases, Will Not Release the Defendant Here Contrary to the Ruling of the Court Below.

The court below, in its opinion (Tr. 246), puts the question before it thus:

“Plaintiffs charged defendant as one of several joint tort-feasors, and the propriety of the District Court’s action depends upon whether two agreements made by them with certain others of the joint tort-feasors amounted in law to a satisfaction and release of the tort, thereby discharging not only those expressly released but also defendant, as one jointly liable. * * *”

The court also observes that:

“Plaintiffs brought an earlier action against certain of the joint tort-feasors in Indiana. Subsequent to judgment therein finding defendants guilty of fraud and directing them to account for property held in trust for plaintiffs and wrongfully converted by defendant. * * *” (Tr. 246.)

Thus the court correctly notes that the order of the court in Indiana was for accounting by the defendant trustees, but failed to note that the suit was in equity for such accounting. The court also failed to note another significant fact, *i. e.*, that the defendant here was a co-trustee with the Indiana defendants (we shall discuss the question of

trusteeship subsequently). After the court having so set forth some of the facts involved in the suits in Indiana and Illinois, it proceeds to examine the documents of April 16, 1942 and that of April 29, 1942, at all times considering the matter as that pertaining to joint tort-feasors and to nothing more.

As we heretofore pointed out, even on the theory of joint tort-feasors the court was in error when it found the two documents, contrary to Illinois law, to be releases. We also pointed out that even with reference to joint tort-feasors the Indiana law would not have considered the documents as releases. We also pointed out that the court erred when it disregarded the Indiana law, where the contracts were entered into, and gave its interpretation based exclusively on the Illinois law. To arrive at the decision, the court below was forced to disregard a number of factors which are apparent from the documents. The court disregarded that the parties' intention was to "compose and compromise" their differences, both of which words appear in the memorandum agreement of April 16th and undoubtedly mean a part satisfaction of the claim, even though it may terminate the litigation as to the parties to the agreement. That there was only a part satisfaction of the claim appears from the clear wording based on the agreement of the parties that the payment to be received by Petitioners is less than the claim they asserted (Tr. 185-191). Nevertheless the court below decided that:

"The two instruments definitely disclose that it was the intention of the parties to compromise, settle fully and release the cause of action" (Tr. 248, 249).

We submit that there is no justification for the conclusion that the parties intended to release the cause of action, but, to the contrary, they intended and contemplated the exchange of mutual covenants not to sue (Tr. 195). The court below concluded that "in substance and actual intent,

as well nigh in actual form, the contracts constituted a release" (Tr. 249). This conclusion, is in contradiction to the wording of the document of April 29, 1942, which states that:

"* * * The foregoing covenants not to sue and the acceptance of such mutual covenants not to sue by the parties hereto shall not be and is not to be taken to be a discharge or satisfaction of the whole or any part of the liability of the parties hereto, and shall not in any wise affect any claim which any party hereto has or may have against any person or corporation growing out of the operation of the Oxford Institute Contingent Bonus Fund * * * (Tr. 197).

The Court below made its findings and conclusions on the basis that:

"the legal liability of the parties * * * was that of joint tort-feasors" (Tr. 249).

indicating clearly that the matter before it was considered by the court purely and simply a legal proposition, disregarding completely the equity aspect of the case, as it disregarded any other law but that of the State of Illinois, as when it stated that:

"* * * the attempted reservation of a cause of action against another of the joint tort-feasors was, under the Illinois law, as previously decided by this court, of no effect" (Tr. 249).

The court, thus having interpreted the Illinois law, found that the defendant in this case was discharged, thereby, it assumed that the laws of Illinois are the *lex loci contractus*. Such an assumption must be made because it was unanimously held that a discharge under the *lex loci contractus* is a discharge everywhere. So it was said in *Baker v. Wheaton*, 5 Mass. 509, 4 Am. Dec. 71; *Ogden v. Saunders*, 12 Wheat. (U. S.) 213, 6 L. Ed. 606; and *Pugh v. Bussell*, 2 Blackf. (Ind.) 394, 2 Kent, 394. However, as the decision of the court below itself points out, the documents in question were drawn and executed in the State of Indiana,

which state will then supply the law applicable to the interpretation of the contract. That the legality of the contract is determined by *lex loci contractus* is recognized by the Illinois courts, as was done in the case of *Miller v. Wilson*, 146 Ill. 523, 37 Am. St. Rep. 186. To be sure there are certain exceptions to this general rule, but none of the exceptions are applicable to the instant case. The application of the Indiana laws to the interpretation of the contracts here involved "will not be injurious to public rights or morals"; it "will not contravene public policy"; it "does not violate a positive law of the *lex fori*." As a matter of fact, the application of the Indiana law and the rejection of the theory of release will favor right, justice and equity, and will support a "salutory public policy" without violating the laws of the State of Illinois. (As to the application of *lex loci contractus*, generally, and for exceptions from the rule, see Dicey, *Conflict of Laws*, page 542, also *Greenwood v. Curtis*, 6 Mass. 379, 4 Am. Dec. 145; *King v. Johnson*, 5 Harring (Del.) 31, 2 Sim. Ch. 194.)

The above rule applies in cases involving torts and joint tort-feasors, but this rule was disregarded by the court below.

There is, however, a further question which was left without consideration by the court below. It disregarded the fact that the Indiana suit and the instant suit were filed in equity. Petitioners prayed in both suits that the defendants be ordered to account.

There is a distinction to be observed between a legal and equitable claim and between the remedies pertaining to each, because:

"In a judicial sense, the term 'equity' is employed usually in contradistinction to strict law, or *strictum et summum jus*. 'Equity jurisprudence,' said Mr. Justice Story, 'may properly be said to be that portion

of remedial justice, which is exclusively administered by a court of equity, as contradistinguished from that portion of remedial justice which is exclusively administered by a court of common law.' "

Am. Jurisprudence, Vol. 19, p. 40.

The court below failed to observe that in an equity case, such as the instant one, will call for a ruling based on the standards and principles underlying equity jurisprudence. We believe that equity and conscience require that the interpretation of the contract be based on an approach which is going to do justice and will be equitable to the parties. The court below dissolved all doubt in favor of finding the documents to be releases and rejected not only any and all doubts against such finding, but rejected the clear wording of the documents and the express intention of the parties, which all pointed to the fact that the documents are nothing more than covenant not to sue. As to equitable proceedings it was said:

"* * * the difference between the remedial justice of the courts of common law and that of the courts of equity is marked and material. That administered by the courts of law is limited by the principles of the common law (which are to a great extent positive and inflexible), and especially by the nature and character of the process and pleadings, and of the judgments which those courts can render. * * * The remedial process of the courts of equity * * * may be so varied as to meet the requirements of these equities, in cases where the jurisdiction of the courts of equity exist by 'commanding what is right, and prohibiting what is wrong'. In other words, its final process is varied so as to enable the courts to do that equitable justice between the parties which the case demands, * * *."

Bishop on Equity, § 11.

We submit that in the instant case, and contrary to the decision of the court below, equity required that doubts, if any, as to interpretation of the contract, dissolved equi-

tably, thereby "commanding what is right and prohibiting what is wrong".

Wherever the courts of equity recognize equitable rights they will give equitable relief. The instant case was filed in equity. The prayer was for equitable relief and the court, so having recognized equity jurisdiction, equitable relief and considerations were in place. We recognize the maxim that equity follows the law, but we also point to the exception which exists in relation to those matters which will provide equitable relief because the rules of law would operate to "sanction fraud or injustice," as here. It is clear from the opinion of the court below that the judgment of the Indiana court found the defendants guilty of fraud and directed them to account for property held in trust for plaintiffs, and wrongfully converted by defendants (Tr. 246). It is also clear from the same opinion that the defendant here was a co-trustee and, as it is termed by the court, a joint tort-feasor with the Indiana defendants. To permit the defendant here to escape by the strict interpretation, or rather an exaggerated interpretation, of the rules of law, would operate to sanction fraud and injustice.

We know the maxim that equity will not permit a wrong without remedy. To permit the defendant here, who, by his answer, admitted participation with others,—who were found guilty of fraud by the Indiana court,—in the commission of certain acts, would create a case where there is a wrong without a remedy. Because of the trial court's failure to consider that the instant case involves equity jurisdiction, and because of its failure to apply the rules of equity, the case ought to be brought here for review.

IV.

**The Court Below Erred in That It Decided the Case in
Disregard of the Relationship of a Trustee and a Cestui
Que Trust.**

The court below properly found that the Indiana defendants were directed by the court there "to account for property held in trust for plaintiffs and wrongfully converted by defendant" (Tr. 246). It designated the defendant here "as one of the several joint tort-feasors" with the defendants in the Indiana suit (Tr. 246). After making such findings, however, it proceeded to disregard entirely the question of the relationship which existed between the Petitioners as *cestui que trust* and the defendant here as trustee. Such a relationship alone makes it just about unavoidable to resort to the equity court because, as Bogart in his book on Trusts and Trustees, said:

"Ordinarily, relief should be sought by the *cestui* in equity". See. 871, p. 2536.

The same textbook sets forth that:

"In many cases the remedy of a *cestui que trust* is in equity only * * * where the trust is open and the suit is for the settlement of an account and the recovery of an unliquidated sum. Equity has generally been held to have exclusive jurisdiction to aid the *cestui*, likewise where the basis of the suit is the negligence of the trustee in managing the trust property * * * or a breach of trust in neglecting to collect and apply the trust assets according to trust terms * * * or where the foundation is the conversion of the trust property and its proceeds by the trustee" (p. 2537).

The record here clearly discloses that the Petitioners sued the defendant, as trustee, for *statement of an accounting* and the recovery of an unliquidated sum. The amended complaint states (Tr. 58) that the defendant:

"* * * was in charge of the Chicago office of said

Oxford, holding at all times the official title of Secretary-Treasurer; the direct management of the office, including keeping of the books, was under his immediate supervision; he received remittances coming into the office; made deposits in the bank; drew, or signed checks on funds deposited; and prepared, sent and filed reports. * * * A certain trust agreement was executed by said Oxford, by its President, Damon Smith and its secretary, A. A. Creaves * * * would create a certain trust under the supervision of five trustees * * * and A. A. Creaves, the defendant herein" (Tr. 58 and 59).

The amended complaint also set forth that:

"The defendant, A. A. Creaves, in conspiracy with the said Damon Smith and Edith Smith, and contrary to the provisions of said trust agreement, made investment of the funds entrusted to said trust and belonging to these plaintiffs * * * the said defendant A. A. Creaves, in utter disregard of the trust imposed upon him in accordance with the trust agreement, did * * *" (Tr. 60).

All this clearly establishes the relationship of a trustee and *cestui que trust*. The amended complaint also shows the need for an accounting, because it is stated that:

"The extent of such use that the proceeds so derived by the defendant A. A. Creaves is unknown to the plaintiffs and known by the defendant A. A. Creaves alone. He ought to be ordered to account to the plaintiffs therefor * * *" (Tr. 68).

The prayer of the amended complaint asks, among others, that:

"(1) the defendant A. A. Creaves makes a true and complete accounting of all moneys received by him * * *"; and

"(2) that the defendant A. A. Creaves make a full accounting of all moneys retained by him from the trust fund * * *" (Tr. 69).

Thus, on the face of the record there was error on the part of the court below in disregarding the relationship existing, which clearly establishes the defendant as a trustee for Petitioners.

As the *Restatement of Trusts*, ¶ 224(2), sets forth:

“A trustee is liable to the beneficiary for breach of trust committed by a co-trustee if he:

“(a) participates,

“(b) improperly delegates administration,

“(c) approves or acquiesces,

“(d) fails to exercise reasonable care, thus enabling breach of trust,

“(e) neglects to take steps to compel co-trustee to redress”.

Under all these headings the defendant here was liable to the Petitioners as trustee. Defendants' answer admits the sale of trust fund Government bonds and the deposit of the proceeds in another account than that of the trust (Tr. 150). He admits the transfer of \$15,350.00 belonging to the trust to the account of one of the defendants in the Indiana suit (Tr. 150). He admits that trust moneys were used for the purchase of lands by the defendants in the Indiana suit and the obtaining by him of certain oil incomes; admits the receipt by him out of such oil incomes of the sum of \$16,800.00 (Tr. 150, 151). Such admissions bring the defendants' liability clearly under the above provisions of the *Restatement*, about which liability the *Restatement* (comments (a), p. 638) has the following to say:

“Where several trustees are liable for a breach of trust committed by them jointly or for a breach of trust committed by one of them for which the others are liable under the rule stated in subsection (2), they are jointly and severally liable to the beneficiary for the breach of trust”.

We submit that the court below erred when it disregarded the fact that defendant here was sued as a trustee

and that he was sued on an express trust, and further erred when it disregarded the fact that the suit was brought in equity for an accounting for an unliquidated claim. It cannot be maintained that the relationship here existing, based on an express trust, can be disregarded because the trustee was released. Even if there were to be a release, the release would not operate unless the *cestui* knew all the facts. From the record it clearly appears that the Petitioners (being the *cestui que trust*), did not and could not have any knowledge as to the facts and as to all the profits made by the defendant as trustee. The Indiana suit was terminated before an accounting was concluded and in consequence no actual information as to the facts or as to the total amount involved was known to Petitioners. Under those circumstances, it was said that:

“Nor can any acquiescence be inferred until the *cestui que trust* has actual knowledge of the breach for the reason that it is the duty of the trustee to execute the trust and it is not the duty of the *cestui que trust* to make any inquiries. So, if the *cestui que trust* gets what he can from the wreck after a breach of the trust, and receives a part of what he is entitled to, he does not thereby waive his right to sue for the whole, when he can obtain it. * * * Wherefore, in order that the release, confirmation, waiver or acquiescence may have any effect, *cestui que trust* must have full knowledge of all the facts and circumstances of the case”.

Perry on Trusts and Trustees, 7 Ed., Vol. 2, pp. 1452, 1453.

The error of the court below, therefore, requires the exercise of this court's power of review.

Conclusion.

The case here presents important issues, among which are:

(1) The determination whether or not a contract executed in the State of Indiana during the pendency of a suit there, is to be interpreted by the laws of that state, or by the laws of the State of Illinois where a third party, not party to the Indiana suit, is brought before the court to account as trustee.

(2) Whether or not certain principles of law are applicable to suits in equity, and

(3) Whether or not trustees sued in equity on an express trust can be regarded simply as joint tortfeasors, disregarding the relationship existing between a trustee and a *cestui que trust*.

The misapplication of the rule concerning *lex loci contractus* and *lexi fori* brought the decision of the court below in conflict with the decisions of the other Circuit Courts of Appeals. Thus, conflicts with the decisions of the lower courts, the proper interpretation of the state laws, the application of general rules pertaining to interpretations, and justice to Petitioners, require that the case be brought here for review.

Respectfully submitted,

FRANCIS HEISLER,
LEON M. DESPRES,
STANLEY F. EVANS,
J. J. GORDON,
Counsel for Petitioners.

FRANCIS HEISLER,
Of Counsel.

January, 1944.

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